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Malayan Banking Bhd v Chairman of Sarawak Housing Developers' Association

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-79–11 OF 2012(Q)
RAUS SHARIF PCA, SURIYADI, AHMAD MAAROP, ZALEHA ZAHARI AND ABU SAMAH FCJJ
28 MAY 2014

Civil Procedure — Representative action — Socities — Chairman of Society commencing representative action on behalf of society — Whether properly brought — Statement of claim not reflecting representative action — Whether non-compliance of O 15 r 12(1) of the Rules of the High Court 1980 — Representative capacity easily identifiable — Whether there was error or uncertainty on the face of the record — Whether injustice caused by rectification — Whether technical non-compliance to be disregarded — Whether application to strike out granted — Rules of Court 2012 O 1A

Unincorporated Associations — Societies — Office bearers — Public officer — No office bearer registered as public officer — Whether society lacked capacity to sue due to absence of public officer — Whether chairman of society could commence representative action on behalf of society — Societies Act 1966 s 9 — Rules of the High Court 1980 O 15 r 12(1)

The plaintiff/respondent had sued the appellant/defendant for refund of RM322,007.95 debited from its account. The respondent's case was that the appellant had wrongfully cleared 186 cheques fraudulently encashed by the respondent's executive secretary amounting to RM322,007.95. The respondent was an association registered under the Societies Act 1966 ('the Act'). In its defence, amongst others, the appellant pleaded that the respondent lacked capacity to sue. The respondent had not registered any of its office bearers as its public officers. The respondent claimed that the chairman of the association was suing on behalf of the association and not in his personal capacity. Relying on s 9(c) of the Act, the appellant submitted that the only person entitled to commence proceedings for and on behalf of the association was its public officers and if none was registered, the suit must be pursued in the personal name of its office bearers. Further, the appellant contended that there was non-compliance of O 15 r 12(1) of the Rules of the High Court 1980 ('the RHC'), in that the statement of claim did not reflect that it was a representative action. The appellant prayed for the claim to be struck out. The High Court decided in favour of the respondent. The Court of Appeal affirmed the High Court's decision on the issue of locus and held that the chairman of the

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association was entitled to sue the appellant by way of a representative action for and on behalf of all its members. Leave to appeal was granted to the appellant in respect of the question whether the Sarawak Housing Developers' Association, which was a society registered under the Act could sue as 'Chairman Sarawak Housing Developers' Association'.

Held, dismissing the appeal with costs:

(1) The second limb of s 9(c) of the Act failed to provide for the society's right to sue another person when there has been a failure to declare and register a member as a public officer by the registrar. However, regardless of the uneven playing field, or lacuna in this provision, this did not take away the fundamental right of the society from being recompensed. If the Act wishes to take away that right, words must be used that point unmistakably to that conclusion. Due to the lacuna under s 9(c) of the Act, O 15 r 12 of the RHC became highly relevant (see paras 22–24).

(2) As no public officer was declared and registered, the respondent had initiated a representative action as permitted by O 15 r 12 of the RHC. A society may sue in the name of its public officer but in the absence of a registered public officer, a representative claim by one or more of its office bearers on behalf of the society would suffice. The format of the respondent's action fell safely within this (see para 28).

(3) Under O 1A of the Rules of Court 2012 the court or judge now shall have regard to the justice of the particular case and not only to the technical non-compliance of the any of the rules (see para 30).

(4) The respondent and his representative capacity, were easily identifiable despite the scrutiny of the intitulement being cursory. No error or uncertainty could be detected on the face of the record let alone no injustice would occur if any rectification exercise was undertaken (see para 31).

(5) The O 15 r 12 as to representative proceedings should be a flexible tool of convenience in the administration of justice and not to be applied in a rigorous sense. In the circumstances of the case, with the chairman being an office bearer empowered to bring the action and redress the wrong suffered by the members, the action was justifiable. All the members represented by the chairman had a common interest and grievance, invaded by an enemy, with the relief claimed in its nature being beneficial to all. Unless redressed promptly the losses suffered would be beyond recovery and ultimately borne by members of the association and the respondent personally (see para 32).

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[Bahasa Malaysia summary

Plaintif/responden telah menyaman perayu/defendan untuk bayaran balik RM322,007.95 yang didebitkan daripada akaunnya. Kes responden adalah bahawa perayu telah tersalah menjelaskan 186 cek-cek yang ditunaikan secara penipuan oleh setiausaha eksekutif responden berjumlah RM322,077.95. Responden adalah persatuan yang didaftarkan di bawah Akta Persatuan 1966 ('Akta tersebut'). Dalam pembelaannya, antara lain, perayu mempli bahawa responden tiada kapasiti untuk menyaman. Responden tidak berdaftar dengan mana-mana anggota jawatankuasa memandangkan ia adalah penjawat awam. Responden mendakwa bahawa pengerusi persatuan telah menyaman bagi pihak persatuan dan bukan dalam kapasiti peribadinya. Berdasarkan s 9(c) Akta tersebut, perayu berhujah bahawa satu-satunya orang yang berhak untuk memulakan prosiding untuk dan bagi pihak persatuan adalah pegawai-pegawai awamnya dan jika tiada yang berdaftar, guaman itu perlu dimulakan dalam nama peribadi anggota jawatankuasa. Selanjutnya, perayu berhujah bahawa terdapat ketidakpatuhan A 15 k 12(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), di mana penyataan tuntutan tidak menggambarkan bahawa ia adalah tindakan representasi. Perayu memohon untuk tuntutan dibatalkan. Mahkamah Tinggi memutuskan dengan memihak kepada responden. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi berhubung isu locus dan memutuskan bahawa pengerusi persatuan berhak untuk menyaman perayu melalui tindakan representasi untuk dan bagi pihak kesemua ahli-ahlinya. Kebenaran untuk merayu telah diberikan kepada perayu berhubung persoalan sama ada Persatuan Pemaju-Pemaju Perumahan Sarawak, yang merupakan persatuan yang didaftarkan di bawah Akta tersebut boleh menyaman sebagai 'Pengerusi Persatuan Pemaju-Pemaju Perumahan Sarawak'.

Diputuskan, menolak rayuan dengan kos:

(1) Bahagian kedua s 9(c) Akta tersebut telah gagal memperuntukkan hak persatuan untuk menyaman orang lain apabila terdapat kegagalan untuk mengisytihar dan mendaftar seorang ahli sebagai pegawai awam oleh pendaftar. Walau bagaimanapun, meskipun tidak adil, atau terdapat lakuna di dalam peruntukan, ini tidak merampas hak asasi persatuan daripada diberi pampasan. Jika Akta tersebut berhasrat untuk mengambil hak itu, perkataan-perkataan hendaklah digunakan yang menunjukkan dengan jelas kepada kesimpulan tersebut. Kesan daripada lakuna di bawah s 9(c) Akta, A 15 k 12 KMT menjadi amat relevan (lihat perenggan 22–24).

(2) Oleh kerana tiada pegawai awam diisytihar dan didaftarkan, responden telah memulakan tindakan representasi sebagaimana dibenarkan oleh A 15 k 12 KMT. Suatu persatuan boleh menyaman dalam nama pegawai awamnya tetapi jika tiada pegawai awam yang didaftarkan, tuntutan

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representasi oleh seorang atau lebih daripada anggota jawatankuasa bagi pihak persatuan adalah mencukupi. Format tindakan responden adalah terangkum di dalamnya (lihat perenggan 28).

(3) Di bawah A 1A Kaedah-Kaedah Mahkamah 2012 mahkamah atau hakim kini hendaklah mengambil kira keadilan kes tertentu dan bukan sahaja kepada ketidakpatuhan mana-mana kaedah-kaedah (lihat perenggan 30).

(4) Kapasiti responden dan perwakilannya, mudah dikenal pasti meskipun penelitian terhadap *intitulement* adalah sepintas lalu. Tiada kesilapan atau ketidakpastian boleh ditemui pada zahir laporan apatah lagi tiada ketidakadilan akan terjadi apa-apa amalan pembetulan telah dilakukan (lihat perenggan 31).

(5) Aturan 15 k 12 berhubung prosiding perwakilan hendaklah menjadi sesuatu yang memudahkan dalam pentadbiran keadilan dan bukan untuk diguna pakai secara ketat. Dalam keadaan kes itu, yang mana pengerusi sebagai pemegang jawatan yang diberi kuasa untuk memulakan tindakan dan menuntut ketidakadilan yang ditanggung oleh ahli-ahli, tindakan itu adalah wajar. Kesemua ahli yang diwakili oleh pengerusi mempunyai kepentingan dan kilanan yang sama, dicabuli musuh, dengan relief yang dituntut mengikut kebiasaannya adalah bermanfaat kepada semua. Kecuali dituntut segera kerugian yang dialami tidak dapat diperolehi semula dan akhirnya ditanggung oleh ahli-ahli persatuan itu dan responden secara peribadi (lihat perenggan 32).]

Notes

For cases on office bearers, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3277–3280.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)

Chin Mee Keong & Others v Pesuruhjaya Sukan [2007] MLJU 413; [2007] 5 CLJ 363, CA (refd)

Duke of Bedford v Ellis and others [1901] AC 1, HL (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, CA (refd)

Ministry of Housing and Local Government v Sharp [1970] 2 QB 223, CA (refd)

National Assistance Board v Wilkinson [1952] 2 QB 648 (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

S Kulasingam & Anor v Commisioner of Lands, Federal Territory & Ors [1982] 1

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MLJ 204; [1982] CLJ (Rep) 314, FC (refd)
Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors [2013] 5 MLJ 716, CA (refd)
Seaford Court Estates Ltd v Asher [1949] 2 KB 481, CA (refd)
Smith v Cardiff Corpn [1954] 1 QB 210, CA (refd)
Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146, SC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, PC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors & Other Appeals [1996] 2 MLJ 265; [1997] 2 CLJ 607, CA (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)

Legislation referred to

Rules of Court 2012 O 2 r 1, O 15 r 12
Rules of the High Court 1980 O 1A, O 2 r 1, O 15 r 12, O 15 r 12(1)
Societies Act 1966 s 9, 9(c)

Appeal from: Civil Appeal No Q-02–841 of 2009 (Court of Appeal, Kuching)

Chan Kay Heng (Chan & Chan Advocates) for the appellant.
Lim Heng Choo (Lim & Lim Advocates) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] The defendant, hereinafter referred to as the appellant, had filed a successful leave application before us in respect of the sole question of law which reads as follows:

> Whether the Sarawak Housing Developers' Association, which is a society registered under the Societies Act 1966, can sue as 'Chairman Sarawak Housing Developers' Association'

[2] The plaintiff ie the respondent had sued the appellant for the refund of RM322,007.95 debited from its account. In the course of the hearing at the High Court, followed by an appeal at the Court of Appeal, much centered on the issue whether the respondent was right in suing the appellant under the office-bearer's capacity of 'Chairman, Sarawak Housing Developers' Association' rather than his individual name. As gleaned from above the Sarawak Housing Developers' Association ('the association') is an association registered under the Societies Act 1966 ('the Act').

[3] The respondent's case was that the appellant had wrongfully cleared 186 cheques encashed by the association's executive secretary ie one Nazerah Hj Obeng ('Nazerah'), causing the association's account to be debited of the

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aforesaid sum of RM322,007.95. The respondent wanted a refund of the latter sum. In its defence, amongst others, the appellant pleaded that the respondent lacked capacity to sue.

[4] For better appreciation of this appeal, in relation to the question for our determination we reproduce the facts, with the chronology beginning with a letter dated 6 October 1992, when the association applied to open a current account with the appellant at its branch at Wisma Satok. In support of the account application the following documents were supplied, viz:

(a) the relevant Malayan Banking application forms;

(b) copies of the Rules and Regulations/Constitution of the Association;

(c) a list of the current board members; and

(d) the association's resolution to open the current account.

[5] The application was successful and the association's current account supplied by the appellant bore the No 0–11113–20591–2 ('the account'). The appellant was notified of the persons allowed to operate the account. One of the Rules made known to the appellant at the time of opening the account was evident in para 9.3 of the Rules and Regulations, and reads:

> All cheques or withdrawal notices on the Association's account shall be signed jointly by the Chairman (or in his absence the Vice-Chairman) and the Treasurer. In the absence of the Treasurer the Assistant Treasurer shall sign in his place.

[6] It is pertinent to note that the appellant was forwarded a copy of the Rules and Regulations and was also furnished with the names of the office bearers and signatories of all related negotiable instruments, from the time the account was approved, together with the changes in the office bearers.

[7] Following the third executive committee meeting of the association on 11 April 2002, the abovementioned Nazerah was appointed the executive secretary and tasked with the daily administrative duties of the office. She was also tasked with the recording of the minutes of the executive committee meetings. At the same time, she kept the cheque book of the account.

[8] Vide letter dated 18 May 2002, purportedly signed by the association's chairman, the appellant was informed that Nazerah, was named as an additional signatory of cheques subject to a limit of RM2,000. The letter also informed the appellant that only one signatory was required for cheques of RM2,000 and below. Attached to the letter was part of the minutes of the executive committee's meeting of 11 April 2002, stating that Nazerah would be one of the authorised signatories on behalf of the association. The said minute

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was signed by her and purportedly too by the chairman.

[9] Between 23 May 2002–25 April 2003 a total of 186 cheques were issued by Nazerah, with them being drawn and made payable 'Cash' or for other third parties, for sums of RM2,000 or less altogether totalling RM322,007.95.

[10] The fraudulent acts of Nazerah went unnoticed until the end of April 2003 when the association's auditor highlighted the irregularities in the account. This resulted in a police report being lodged against Nazerah. In fact the appellant was also notified. The association thereafter filed an action against the appellant to recover the proceeds of the honoured cheques signed by Nazerah.

[11] In the course of the trial at the High Court, apart from para 9.3 of the Rules and Regulations supplied above, the following clauses also took centre stage, and they are:

(a) cl 9.2: 'I/We agree to examine and notify the Bank of any errors, irregularities, discrepancies, claims and unauthorized debits or items whether made, processed or paid as a result of forgery, fraud, lack of authority, negligence or otherwise by any person whatsoever';

(b) cl 9.3: 'I/We further agree that If/we fail to advise you in writing of the non-receipt of the statement from you, or to notify you of any errors, discrepancies, claims or unauthorized debits or items in the statement within twenty-one (21) days from the date of the statement, the Bank's accounts or records shall be conclusive evidence of the transaction entries and balances in such accounts and I/We shall be deemed conclusively to have accepted all matters contained in the statement as true and correct in all aspects (Conclusive evidence clause)'; and

(c) cl 6.2: 'The conditions printed on the cover of the cheque book are to be strictly observed'.

[12] The respondent's cause of action was premised on the grounds, inter alia, that the appellant had breached its duty of care in failing to check with the office bearers, failed to appreciate the Constitution of The Association, and to find out the truth of the contents of the letter dated 18 May 2002. The respondent also argued that forgery was indeed committed by Nazerah. Due to the combined failures to act accordingly, the appellant was alleged to have committed the tort of conversion.

[13] As regards the issue of capacity the respondent maintained firmly that the chairman of the association was suing on behalf of the association and not in his personal capacity. Though both parties agreed that the respondent had

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not registered any of its office bearers as its public officers, and conceded by both that such oversight was not fatal, the respondent on the other hand submitted that it was entitled to institute the proceedings as per the statement of claim.

[14] The appellant held the simplistic view that the only person entitled to commence proceedings for and on behalf of the association was its public officers and if none was registered, the suit must be pursued in the personal name of its office bearers. To do otherwise was clearly in contravention of s 9(c) of the Act. This explains para 1 of the defence where it was alleged that the respondent lacked capacity to sue, and with such a serious flaw detected, the claim must be struck out. Further, the appellant contended that there was non-compliance of O 15 r 12(1) of the Rules of the High Court 1980 ('the RHC 1980'), in that the statement of claim did not reflect that it was a representative action.

[15] As regard to the burden of proof the appellant canvassed that it was up to the respondent to establish the fact that Nazerah was not authorised to sign cheques. As far as it was concerned no forgery was proven in respect of the minutes of the committee meeting of 11 April 2002. And lastly cll 9.2 and 9.3 were in its favour.

[16] Had the appellant been successful in its argument pertaining to the locus standi issue, the substantive evidential matter of whether the respondent had exercised due care when drawing the cheques which would have avoided the facilitating of fraud or forgery, and whether the respondent had been prompt in informing the appellant of any unauthorized cheques, the action would have ended there (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80; *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31. As the antecedents showed, the High Court upon full hearing instead decided in favour of the respondent and, inter alia, adjudged that the action was commenced in accordance with law. Being dissatisfied with the High Court's decision the appellant filed an appeal to the Court of Appeal. The Court of Appeal affirmed the High Court's decision on the issue of locus and held that the chairman of the association was entitled to sue the appellant by way of a representative action for and on behalf of all its members.

[17] At the outset we stated that leave from this court was granted on 2 October 2012 in respect of only one issue (see the above question as supplied). That being so, the paramount question before us fell squarely on the issue of whether the respondent was right in alluding to the capacity of the chairman of the association or should he have alluded to his personal name, as no public officer was declared and registered by the registrar of society.

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[18] Since the Malaysian rules regarding locus standi is strict, what interpretation then should be given by us, in the context of the intitutlement of this appeal? Despite the multiplicity of rules of interpretation of statutes, some of which supplies the judge with wide discretion, such privilege is not an excuse to detract from interpreting the true intention of Parliament. The judge invariably assumes a significant role when faced with conflicting interpretations and cannot fold his arm and thenceforth blame the draftsman for the creases in the provisions (*Seaford Court Estates Ltd v Asher* [1949] 2 KB 481; *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223; *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265).

[19] Since the question imports s 9(c) of the Act this provision therefore must be dealt with forthwith. It reads:

> A society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any officer-bearer of the society.

[20] The respondent is a functioning registered society registered on 6 July 1993 carrying the Registration No 33/93 (Sarawak), and having property, office bearers and the like and is subjected to the provisions applicable to registered societies under s 9 of the Act. The moveable property of the respondent is deemed to be vested in the governing body of the society whilst the immoveable property may be registered in the name of the society.

[21] A brief scrutiny of the above provision of s 9 of the Act may conveniently be split into two limbs in that a society may sue or be sued in the name of such one of its members as shall be declared to the registrar and registered by him as the public officer of the society. As it is common ground that no public officer was declared and registered by the registrar of society this first limb is inapplicable for the current appeal.

[22] The second limb speaks of a given situation where if no such person is registered (as in the current case), it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society. This limb enables any person having a claim to sue the society but failed to provide the latter's right to sue another person when there has been a failure to declare and register a member as a public officer by the registrar. Therefore, regardless of the uneven playing field, or lacuna this provision or the Act for that matter, does not take away the fundamental right of the society from being recompensed.

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[23] If the Act wishes to take away that right, words must be used that point unmistakably to that conclusion (*National Assistance Board v Wilkinson* [1952] 2 QB 648). Devlin J in clear terms said:

> It is a well-established principle construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion ... It is another principle of statutory interpretation that the court leans against an interpretation which produces unjust and arbitrary consequences.

[24] Due to the aforesaid lacuna under s 9(c) of the Act, O 15 r 12 of the Rules of the High Court 1980 (in pari materia with the Rules of Court 2012) becomes highly relevant. This provision reads:

> Representative proceedings (O 15 r 12)
>
> (12)(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, *the proceedings may be begun* and, unless the Court otherwise orders, continued *by* or against a*nyone or more of them as representing all* or as representing all except one or more of them.

[25] The silence on the requirement of the personal name of a party is resounding and obviously this rule is more flexible than s 9(c) of the Act thus enabling the respondent to pursue the matter pursuant to the above order. The factual findings of the learned judge is enlightening and useful as regards the evidence of this action. From the very testimony of the chairman of the association the learned judge accepted his evidence that the suit was representative in nature. The learned judge concluded that the appellant knew from the outset that the association was seeking recovery of the abovementioned sum of RM322,007.95 and by no account could have been misled as to the identity of the respondent or type of action filed. The learned trial judge further opined that the defence of the appellant was merely an advocacy ploy which could not be condoned by him.

[26] The Court of Appeal likewise had opined that the chairman of the respondent acted in accordance with law by commencing and pursuing this matter against the appellant in the way it did. In its grounds of judgment the Court of Appeal, inter alia, adjudged as follows:

> ... We are in agreement with the learned trial judge that it is evident from the respondent's pleaded case and the evidence of its chairman that this claim is being pursued by the chairman on behalf of its members. To the extent that it is not fatal for an association to sue in the name of an office bearer in the absence of a registered public officer, and this action is clearly maintainable in law.

[27] In fact the acceptability of the respondent's action falls within the dictum of James Foong JCA in *Chin Mee Keong & Others v Pesuruhjaya*

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Sukan [2007] MLJU 413; [2007] 5 CLJ 363, which reads as follows:

> ... the approach should be these: Firstly, for certain, an association cannot sue in its own name. Preferably an action should he commenced by its registered public officer. If none is registered as such, then it is permissible for any office-bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding which is permitted under Order 15 r 12 of the RHC

[28] The action here was not commenced in the name of the association hence not breaching any rule of the inability of an association to sue in its name. As no public officer was declared and registered, the respondent had initiated a representative action as permitted by O 15 r 12 of the Rules of the High Court 1980 (O 15 r 12 of the Rules of Court 2012). On this point see also the case of *S Kulasingam & Anor v Commisioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204; [1982] CLJ (Rep) 314, where Eusoffe Abdoolcader J (as he then was), speaking for the court had opined that a society may sue in the name of its public officer but in the absence of a registered public officer, a representative claim by one or more of its office bearers on behalf of the society would suffice. Alluding to the above speech we find that the format of the respondent's action falls safely within it.

[29] Generally speaking, the issue before us, which is a point of practice and procedure and no stranger to courts, and have been consistently affirmed by courts that an intitulement that is wrong at the outset or there is uncertainty as to the type of suit, entitles the court to strike it out (see *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; *Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors* [2013] 5 MLJ 716; *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457). However the strict interpretation of the procedural landscape saw a shift with the promulgation of the previous O 2 r 1 of the Rules of the High Court 1980 and was reaffirmed in the Rules of Court 2012, whereupon any omission or mistake is to be regarded as an irregularity, rectifiable so long as it can be undertaken without causing injustice. The distinction between mere irregularities and nullities now ceased to exist. The relevant provision of O 2 r 1 of the Rules of Court 2012 reads as follows:

> 1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order therein.

[30] Under O 1A of the Rules of the High Court 1980 the court or judge

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now shall have regard to the justice of the particular case and not only to the technical non-compliance of the any of the rules.

[31] In the current appeal, the respondent and his representative capacity, were easily identifiable despite the scrutiny of the intitulement being cursory. In a nutshell no error or uncertainty could be detected on the face of the record let alone no injustice would occur if any rectification exercise is undertaken (see *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729; *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146). With a litany of cases available in current publications pertaining to O 2 r 1 no more legal activism is required on this matter.

[32] The O 15 r 12 as to representative proceedings, designed to avoid multiplicity of proceedings, should be a flexible tool of convenience in the administration of justice and not to be applied in a rigorous sense. In the circumstances of the case, with the chairman being an office-bearer under article 3(3) of the Association's Constitution, empowered to bring the action and redress the wrong suffered by the members, the action is justifiable. Here all the members represented by the chairman have a common interest and grievance, invaded by an enemy, with the relief claimed in its nature being beneficial to all (see *Smith v Cardiff Corpn* [1954] 1 QB 210; *Duke of Bedford v Ellis and others* [1901] AC 1). As opined by the Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors & Other Appeals* [1996] 2 MLJ 265; [1997] 2 CLJ 607, inevitably down the line it would be the members who will become the ultimate victim in any loss suffered by a club (or society, as in this case). Unless redressed promptly the losses suffered here will be beyond recovery and ultimately borne by members of the association and the respondent personally.

[33] In light of all the above factors the respondent's action cannot be said to be on the face of it null and void. Evidentially by alluding to his capacity as the chairman it was reasonable to infer that this was a representative action. Taking the argument a step further had he used his personal name, it could be inferred that the action was a personal one.

[34] Having perused the question posed we do not intend to supply a simple yes or no answer but instead state that the Sarawak Housing Developers' Association cannot sue under the association's name. This is founded on trite law. By adding the word 'Chairman' as a prefix to the association does not make this an action initiated by the association per se. The respondent on the other hand may sue as chairman, Sarawak Housing Developers' Association on a representative capacity even though not a public officer, without the need to allude to his personal name as suggested by the appellant. This is a cut and dry case carried out by an office-bearer who holds an office recognised by the

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A Association's Constitution on behalf of the members. We thus uphold the findings of the High Court and the Court of Appeal and therefore dismiss the appeal with costs.

Appeal dismissed with costs.

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Reported by Kanesh Sundrum

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